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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ANGELO GEORGE TYPALDOS,<br>Defendant and Appellant. | G040288<br>(Super. Ct. No. 05NF0867)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

We reject defendant's arguments that his convictions for child molestation should be reversed because of a *Brady v. State of Maryland* (1963) 373 U.S. 83, violation, discovery violation, prosecutorial misconduct, faulty jury instructions, the admission of evidence of uncharged offenses and improper sentencing. We affirm.

I

FACTS

A jury found defendant Angelo George Typaldos guilty of three counts of committing a lewd act on a child under age 14 as charged in counts one, two and three. On count two, the jury found it to be true defendant's crime constituted substantial sexual conduct to wit, digital penetration. On count three, the jury found it to be true defendant occupied a position of special trust and that his crime constituted substantial sexual conduct to wit, digital penetration or masturbation. The court sentenced defendant to five years in prison.

C.E. was 32 years old when she testified in 2008. She identified defendant as her biological father, and said she last saw him 13 years earlier. She moved out of her parents' home when she was 16 and became emancipated. She is the second oldest of eight children consisting of five daughters and three sons.

One night, when she was 13, she awoke to find her father's hand inside her pants "rubbing" her vagina. She asked defendant what he was doing, and he responded: "Oh, come on, [C.E.]. You know what I'm doing. You've known all along what I've been doing. What are you talking about?"

When she was 13, C.E. was "regularly" alone with defendant at his shop. He had her sit on his lap and kissed her "mouth-to-mouth" using his tongue. She was asked what was the "worst thing he did to you," and she described a scene where she was on a table. Neither had their pants up and he was rubbing parts of his body on parts of her body. C.E. said she did not like it at first, but then she became aroused. At other

times, defendant "would put his hands down my pants while he was driving." At times, there was digital penetration.

At one point, C.E. was going to counseling and Mrs. Typaldos (mother) asked her "if it was happening," and C.E. said "no." Her mother said: "If it's happening and you don't tell me and it happens to all the kids, I will never forgive you. I will always blame you, and it will be your fault." Later that day, she told her mother. At trial, she said: "And when my mom picked me up, I told my mom that that it had happened. I didn't go into details with my mother. My mom was devastated."

She was asked why she had not told her mother earlier, and she explained: "I thought there was something wrong with me. I thought there's an aura around me or something, and that I just made people do these things. There was something bad about me that I made them do it."

At around the same time, she and her sister S.T. "were involved in a trial . . . regarding [their] stepgrandfather." That trial involved allegations of molestation when C.E. was six or seven years old. Prior to being molested by her stepgrandfather, C.E. was molested by a gardener when she was four or five years old.

After she told her mother about what defendant had been doing to her, C.E. was sent to live with relatives in Colorado and then San Francisco. She returned home again when she was 14, almost 15 years old. When she got home, her parents "sent [her] to a mental hospital" for about six weeks and then to a group home for six months.

When she returned home again, defendant did not molest her anymore. But he was "physically abusive" to her: "I remember one time that he was — I don't remember — he was pretty mad at me, and he suffocated me with a pillow. I thought that was it. I really thought I was going to die." At that time, she was in the 10th grade. She said it happened "after I realized what was happening to my sister [S.T.]."

In 2002, she had a conversation with another sister, D.T. In 2004, C.E. accompanied D.T. to the police station. C.E. said she had no intention of saying what

had happened to her and that she was there for emotional support for D.T., but the detective requested that C.E. speak with her and she did.

D.T. was 24 years old when she testified. She said she was 11 or 12 when her father started doing inappropriate things to her. At first, he spanked her with her clothes on, "but he would like accidentally touch my private area when he would spank me." At that time, they were living in Cerritos.

In 1995, the family moved to Orange County and defendant worked in Anaheim. She said her father had always been mean when she was growing up, and just before she turned 12, "he started being really nice to me, and like he took my friend and I to the movies. He would like buy me stuff and it wasn't — he was never like that to us — to me or any of my siblings before." She explained: "I think that was the first time I really realized that something weird was happening." At the movies, defendant put his hand on her upper thigh, "like the crease is between your leg and your abdomen, like right there" and leave it there.

One time, just after her 12th birthday, she was at work with defendant and he asked her to retrieve a board for him. She said that while she was pulling it out, "he came up behind me. And he took his — my hand and put it on his private part behind me. And then I pulled it away, and then I said something like, 'I'm just going to get the board.' And then he was like whispered something like 'oh, just get the board' or 'don't worry about the board,' or something. And then he took his hand and he slid it down my pants." She added: "He kind of started touching the top of my vagina and then — I don't remember exactly how it ended, but I just kind of like walked away."

A little while after that, defendant told D.T. he wanted to spank her and would give her $10 if she would let him spank her. She said she did not want to be spanked and he pulled her down on his lap and said "I just have to take your pants off to do this." He spanked her bare bottom. Then he touched her vagina. She said: "He was touching like the outside of my vagina. And then he would spank me again, and then he

actually took like a finger and put it in inside me." Once inside, defendant "just like moved it around."

That evening, she went into her mother's bedroom and said: "Mom, I have to talk to you." D.T. closed the door and then she "told her what happened." After that, her father stayed at the office and would just come home to take showers.

D.T. said what she did after she spoke with her sister, C.E., in 2002: "When I found out what happened to my sister, I started asking my other sisters. I told them what happened to me, and I wanted to know if they had been molested. And I mentioned to them that I might go to the police, and nobody wanted me to go." She also spoke with her mother, but she did not go to the police. She said: "I was really worried about what was going to happen to them. Just where they were going to get their money from."

In 2003, D.T. watched a film in which "the main character confronts the people that abused him. It just really made me upset, and so I just left right after the movie and I drove to my mom's house. And he was there. . . . And I just started yelling at my father . . . . [¶] . . . [¶] I was telling him, 'It's not fair that you did this to me. Now you are going to be here with my family, and I'm the one who's out." D.T. reported defendant to the police in March 2004.

The prosecutor asked if she said anything specifically about defendant molesting her, and D.T. said: "Yeah. I told him, 'I just want you to admit so everyone can hear it that you molested me. I want everyone to know in this house.' And he would say, 'Yes, I molested you. If you went to the police, I wouldn't deny it. I'm sorry. I love you.'" D.T. said she kept talking and defendant "started kind of coming towards me, and he had his arms out, and he's like he wanted to hug me. And he kept walking towards me saying, 'I'm sorry, I'm sorry.'" After that, she next saw defendant at court hearings.

D.T. testified her mother told her that when she was two years old, her stepgrandfather molested her, and that she was sexually assaulted by a date when she was

19. She said: "After he raped me and I was already coming from being a molested child, I just felt like trash."

Mother has been defendant's wife for 34 years. She said she never asked either C.E. or D.T. "in detail about what their father had done to them." In 2004, D.T. picked her up and drove her to the police station after D.T. told her she would be arrested if she did not go. The prosecutor asked her whether D.T. told her in 1995 that defendant had molested her, and mother responded: "Absolutely did not." She added: "She said he spanked her on her bare bottom, yes." Mother denied that defendant started sleeping at work after D.T. told her he spanked her, although when the prosecutor asked: "Did you tell Detective Faria that when [D.T.] told you what happened back in 1995, that you called him on the phone and told him that he was not allowed to live there anymore. Did you tell her that?" Mother answered, "I might have, I don't know." She also admitted telling the detective that D.T. had told her defendant "put his hand down her pants" and that defendant did not deny he did and said he was sorry. Mother admitted she told the detective her other daughters had not been molested by defendant "because he hasn't lived there. I never let them go anywhere with him or anything." She explained why she said what she said to the detective: "If I did, it was just because I would say anything to keep from going to jail and losing my kids. I was told what to say on the way there, and that's what I said." But then when she was asked to read the transcript of her interview with the detective which said, "My God, this guy cannot be trusted with the kids. I'm not going to let it go beyond this," she stated: "Yes, that's what it says."

Prior to the testimony of a clinical psychologist Veronica Thomas, the court read a limiting instruction to the jury: "You will hear testimony from Dr. Veronica Thomas regarding child sexual abuse accommodation syndrome. [¶] Dr. Thomas' testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or not [C.]E. or [D.]T.'s conduct was not inconsistent

with the conduct of someone who has been molested and in evaluating the believability of her testimony. [¶] I'm going to repeat the middle part of this instruction. [¶] Dr. Thomas' testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. That's a limiting instruction. [¶] Both counsel satisfied with the limiting instruction?" Both said "yes."

Thomas said child sexual abuse accommodation syndrome was put forth as a theoretical approach after it was noticed "when treating victims of father/daughter incest, that there were certain commonalities in their responses and the way they reported their experiences that were different from those individuals in the community that were molested or abused by a stranger." The first stage of the syndrome is secrecy. The second is "helplessness and sometimes depression." The third stage is entrapment and accommodation. The fourth stage is disclosure. Thomas explained the disclosure stage, remarking: "If it's a family situation, or a team situation, the child being molested frequently takes into consideration the impact of disclosure on other people involved." The fifth stage is recanting, which does not happen in every case. She said: "Recanting represents a point in time where the child victim recognizes that because of the nature of the disclosures, perhaps big things have happened at home or on the team."

M.T. one of defendant's sons, was 17 when he testified. He was shown a photograph of a Suzuki car and he identified it as belonging to his sister N.T. M.T. said D.T. "was crazy about" the Suzuki. He was asked about D.T.'s reaction when the Suzuki was given to N.T. and he responded: "She was jealous." And "she thought that since she was older and was in a higher grade and stuff, she felt that she should have it."

Anaheim Police Detective Elizabeth Faria met with D.T. in March 2004 to conduct a covert telephone call with defendant. During the call, D.T. said: "But [t]he problem came from you molesting me." [¶] Defendant: "Okay." [¶] D.T.: "I was twelve years old, like, I don't understand how you can look at me . . . look at me and think that uh. I don't understand how you could put me over your lap and do those things

to me?" [¶] Defendant: "That [D.T.], I, I, I, understand. Uh, I mean, if you want to talk about it, I'll talk about it with you." [¶] . . . [¶] D.T.: "Were you mol — were you molested by Nick?" [¶] Defendant: "I, you know, I don't wanna talk to you about this stuff over the phone. I mean, uh, I, I, (sigh)."

Faria was asked about her interview with mother and the time D.T. accused defendant of molesting her. The mother confirmed that D.T. said it "in front of everybody, and then the other kids went up to their room." She said defendant said he was very sorry, hugged D.T. and talked about getting therapy with D.T.

II

DISCUSSION

*Alleged Discovery and Brady Error*

Defendant contends reversal is required because the prosecution violated California's discovery statutes as well as *Brady v. State of Maryland, supra,* 373 U.S. 83. The Attorney General responds the prosecutor's not providing documents relating to molestations of C.E. and D.T. by their stepgrandfather was inadvertent and did not arise to either a discovery or a *Brady* violation.

During pretrial sessions, defense counsel informed the court the defense "dug up the old testimony" a 300 page transcript from the trial of the stepgrandfather. The defense filed a pretrial motion entitled "Motion for Pretrial Discovery" in which defendant requested, "Any incident reports filed by the Los Angeles District Attorney in about 1988 against Harvey Nicholas Weaver a.k.a. 'Nick.'" The court conducted a hearing , and counsel said C.E. testified in the prior trial when she was 13 years old and that the stepgrandfather was convicted of molestation. The judge questioned defense counsel at length to ascertain the relevancy of the prior trial, and actually warned counsel: "So now you want to have a jury hear well, the stepgranddad molested somebody, the jury may say, well, you know, monkey see, monkey do." Later the court said to defense counsel: "I just want to make it plain and simple and very clear on the record that you're

the one that wanted this to come in. The D.A. is opposing you getting this in. I'm just saying that this could be evidence that you're thinking, thinking about with tunnel vision and not seeing the big picture."

While arguing the motion, the prosecutor informed the court that the prior case against the stepgrandfather concerned charges involving C.E. and D.T., and another sibling, S.T. Defense counsel then pointed out that D.T. "was too young to remember it, so she wasn't a charged victim" in the trial against the stepgrandfather. While arguing the motion, defense counsel told the court she was looking at the transcripts "of the police statement that [C.E.] makes to the police. Okay. And she says that she never reported the incidents to the police. She reported it to the psychiatrist who she was seeing. And she also said that the incidents with her father started when she was in the middle of the trial with Nick. She was in the 7th, 8th grade that she was going through the trial with her stepgrandfather, and all of a sudden her father starts molesting her."

The trial court again tried to find out just what it was the defense wanted: "My understanding of your motion is that you're attempting to get out the fact that [C.E.] was molested by the stepgrandfather." Defense counsel clarified: "[I] need to show that, and I'm trying to show how unlikely it is that she would have not said anything about her father molesting her when she is going through a trial for the same thing with her stepgrandfather." The court weighed the probative value against its prejudicial effect and permitted defense counsel to go into evidence of the charges and trial of the stepgrandfather regarding credibility and timing issues.

During trial, after C.E. and D.T. were excused, Detective Elizabeth Faria testified on cross-examination that she "got a copy of some court document" from "the girls." She said, "[I] gave the copy to the D.A.'s office. I never looked at it myself."

Defense counsel asked to approach the bench with the court reporter. Counsel told the court: "I'm concerned with documents that were given to her by the

girls that were turned over to the D.A.'s office that I have never seen." She added she "need[ed] to know what those were."

The next morning, the prosecutor told the court she went through "the D.A. file" and found papers from the stepgrandfather's prosecution which she described as: "a package in there that essentially includes . . . there are no police reports. It includes the appellate decision by the appellate court, the appellant's opening brief, and the preliminary hearing transcript. [¶] And in that essentially the only thing that I could garner that — out of the appellate decision and out of the appellate decision by the court, that there was a covert call between [mother] . . . and the stepgrandfather in which she asked the stepgrandfather did you ever make [C.E.] suck your penis, and he said, 'I may have.' He also admitted in that covert phone call to grabbing [C.E.], [S.T.], and [D.T.]. He didn't say where, it doesn't say where. [¶] And in the preliminary hearing transcript, [C.E.] testified at that regarding the acts of abuse, the number of times — and so forth."

The court ordered the prosecutor to show the documents to the defense. While not precisely clear, it appears from the record that defense counsel made the following statement while looking through the documents: "I'd like to know the circumstances of how the girls got this. [¶] What's interesting is this shows they did research on it, because one of the issues was a statute of limitations. That was raised in the opening brief. Whether the defendant's statement was properly admitted, and whether prior abuse could get in."

The defense moved for a mistrial based on prosecutorial misconduct. Before ruling, the court permitted defense counsel to question Faria further. The court denied the motion for mistrial.

In *Brady v. State of Maryland, supra*, 373 U.S. 83, the court held the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. (*Id.* at p. 87.) "For *Brady* purposes, evidence is

favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. [Citations.]" (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132.) "Evidence is material under the *Brady* standard 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' [Citation.]" (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7-8.)

California's discovery statutes require "the prosecution to disclose to the defense, in advance of trial or as soon as discovered, certain categories of evidence 'in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies.' [Citation.] Evidence subject to disclosure includes '[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged' [citation] and '[a]ny exculpatory evidence' [citation]. Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. [Citation.]" (*People v. Zambrano, supra*, 41 Cal.4th at p. 1133; Penal Code §§ 1054.1, 1054.7.) "'Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession *or is available to a defendant through the exercise of due diligence*, then . . . the defendant has all that is necessary to ensure a fair trial . . . .' [Citations.]" (*People v. Zambrano, supra*, 41 Cal.4th at p. 1134.)

Here defense counsel had gone to the Court of Appeal and obtained the transcript of the trial testimony from the stepgrandfather's trial. Thus, while cross-examining all of the witnesses who testified in both this and the stepgrandfather's trials, defense counsel knew exactly what each said in the previous trial. Additionally, at the request of defendant, some details of the previous trial were revealed during this trial.

While both C.E. and D.T. testified about being molested by their stepgrandfather when they were little girls, D.T. said she did not remember the previous

molestations and only knew what her mother told her about them. Indeed, defense counsel conceded to the trial court that D.T. had no memory of what her stepgrandfather did to her because she was just too young at the time.

The documents involved are the preliminary hearing transcript from the stepgrandfather's prosecution, his opening appellant's brief and the Court of Appeal opinion. Defendant has pointed to nothing in particular in any of the three documents, which was not also contained in the transcript of the testimony from the earlier trial, and which might have made any difference during the instant trial had they been available earlier. Defendant did not specifically or generally request the three documents in his discovery request. He did not ask the court to recall C.E. or D.T. for further cross-examination. Nor has he argued the three documents were not equally available to him. Under the circumstances in the record before us, we cannot conclude these documents were material to the defense here or that their late production in any way affected the outcome of defendant's trial.

*Prosecutorial Misconduct*

Defendant next contends reversal of his conviction is required because of three instances of misconduct during argument by the prosecutor which deprived him of a fair trial. The Attorney General says there was no misconduct, and that in any event defendant forfeited his claim because he did not object at trial.

During her final argument, the prosecutor said: "So why would the defendant molest his children? Well, you heard in the covert call [D.T.] asked the defendant 'Were you molested by Nick?' What is the defendant's response? He didn't say, 'No, I was never molested by Nick. My dad didn't do that to me,' or 'No, that never happened.' He said, 'I don't want to talk about this on the phone,' suggesting he could have been. I don't know. [¶] But it would explain why the defendant molested [D.T.]

and [C.E.], because he had learned it from his father. Predators know prey when they see it."

The prosecutor also told the jury: "You can't use these counts to convict the defendant of count 3 — this act that occurred in Norco — because that was in Riverside County. You cannot use that. The only acts in this case that you are going to be able to use to convict the defendant of count 3 are either acts that occurred in Orange County or Los Angeles County. I have permission to prosecute the counts in Los Angeles County.

During rebuttal argument, the prosecutor said: "Notably missing in her argument or opening statement was anything about the Suzuki. I didn't hear anything about the Suzuki. We heard hours of testimony about the Suzuki. It was highlighted inordinately in the trial. But there was nothing in her opening statement about the Suzuki motivation for [D.T.]. [¶] [D.T.] got an old jalopy, and her sister got a nice car, but she bought herself a 1999 Honda Accord before she moved out of the house. Apparently it was white. She got the car — [N.T.] said she got the car in either 2002 or 2003. The Suzuki — and I think she said the Suzuki was a 2000 or 2001. That is not much better than the car [D.T.] was able to buy herself."

"Generally, a claim of prosecutorial misconduct is preserved for appeal only if the defendant objects in the trial court and requests an admonition, or if an admonition would not have cured the prejudice caused by the prosecutor's misconduct." *People v. Ledesma* (2006) 39 Cal.4th 641, 726.)

Regarding defendant's first claim of prosecutorial misconduct, the prosecutor's remarks about the possibility defendant, himself, was molested, defense counsel did not pose objections. In his appellate brief, he argues he did not forfeit his claim because "an objection and/or admonitions would not have . . . actually exacerbated the prejudice to appellant." But the defense brought the subject up during argument when counsel said: "And for the prosecution to say something like he learned it from his

father, or whatever is — well, that seems to be outrageous." Nonetheless, the prosecutor's argument was a fair comment on the evidence about an area the defense wanted introduced and the prosecution did not. The prosecutor's argument was not misconduct.

With regard to the prosecutor's argument about having permission from Los Angeles County to file count three, defendant argues: "The improper remarks may have led the jury to speculate that another governmental agency had reviewed the case, concluded there was sufficient evidence to support the count 3 charge, and gave the Orange County District Attorney permission to prosecute it." Defendant's argument on appeal underscores the importance of making a timely objection in order to give the trial court an opportunity to explain the law to the jury or admonish counsel or both.

"'Improper remarks by a prosecutor can "'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" [Citations.]' [Citation.]" 'But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 858.)

By discussing count three, the prosecutor argued a matter which was not in evidence. Sometimes arguing matters which are not in evidence amounts to prosecutorial misconduct. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1316.) In context, it appears the prosecutor was simply explaining to the jury why a crime committed in another county was being prosecuted in Orange County, which, while outside the record, does not approach deceptive or reprehensible methods and is not misconduct.

With regard to argument about the Suzuki, the prosecutor did not imply defense counsel had fabricated evidence to indicate D.T. was biased against defendant because a younger sister received a certain car. Rather, they were fair comments about how unimportant the evidence about the Suzuki was. Had the prosecutor made an attack

on the integrity of defense counsel, it might have amounted to misconduct. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215.) But the prosecutor's statement did not speak to defense counsel's integrity, and is not misconduct.

As to all three areas of alleged prosecutorial misconduct, not only did defendant not object, he did not request the court to admonish the jury not to consider the prosecutor's statements. We are satisfied that an admonition by the court would have cured any harm now perceived by defendant. (*People v. Smith* (2003) 30 Cal.4th 581, 633.) Under the state of the record before us, defendant forfeited his claim of prosecutorial misconduct. In any event, defendant's claims lack merit.

*Adoptive Admissions*

Defendant argues his convictions should be reversed because the jury instruction on adoptive admissions did not direct the jury to view the evidence with caution.[1] He says the instruction was prejudicially incomplete.

Defendant claims the prosecution argued to the jury that he adoptively admitted a crime with regard to two different items of evidence. The first concerns the covert telephone conversation between D.T. and defendant, and the prosecutor's argument defendant did not deny his daughter's accusations. The second relates to the 2003 incident when D.T. went to the family home and accused defendant of molesting

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[1] CALCRIM No. 357 as given by the court, "If you conclude that someone made a statement outside of court that accused the defendant of the crime and the defendant did not deny it, you must decide whether each of the following is true: [¶] One, the statement was made to the defendant or made in his presence; [¶] Two, the defendant heard and understood the statement; [¶] Three, the defendant would under all the circumstances naturally have denied the statements if he thought it was not true; [¶] And four, the defendant could have denied it, but did not. [¶] If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose."

her, and the prosecutor's argument defendant's apology and offer to go to therapy amounted to an adoptive admission.

The Attorney General claims defendant forfeited his claim. Before the jury was instructed, the court asked counsel if they were satisfied with the court's instructions. The prosecutor was, and defense counsel asked the court's permission to argue about a different instruction. To the extent defendant now complains an instruction was inadequate to explain his defense, the burden rested with him to request amplification instructions at trial. (*People v. Silva* (2001) 25 Cal.4th 345, 371.) The Attorney General is correct that defendant forfeited his argument when he did not bring his concern to the attention of the trial judge.

Had defendant preserved his argument, we nevertheless find no error. The statement referred to in CALCRIM No. 357 is of someone other than defendant, in this instance D.T. The cases cited by defendant in support of his argument relate to evidence of statements made by a defendant which warrant CALCRIM No. 358.[2] When it is a defendant's own statement at issue, jurors are cautioned to determine whether the statement attributed to the defendant was in fact made. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1268.)

The jury in this case, with regard to statements made by D.T., was instructed regarding the credibility of witnesses with CALCRIM Nos. 104, 200 and 226. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez*

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[2] CALCRIM No. 358 as given by the court, "You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether or not the defendant made any such — made any of these statements in whole or in part. [¶] If you decide that the defendant made such statements, consider the statements along with all the other evidence in reaching your verdict. It is up to you to decide how much importance to give to such statements. You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded. The defendant may not be convicted of any crime based on his out-of-court statements alone."

(2001) 26 Cal.4th 834, 852.) The jury had to decide if some statement made by D.T. accused defendant of one of the crimes alleged and, if so, whether defendant denied any such accusation. In making those decisions, the jury was carefully instructed it had to find any such statement was made in defendant's presence, defendant heard and understood it, whether the circumstances warranted a denial by defendant and that defendant could have denied it but did not. CALRIM No. 357 is a detailed and carefully crafted instruction which amounts to a mandate for a jury to be thorough and cautious in its findings.

*Uncharged Sex Offenses*

Defendant next argues the jury instruction on uncharged sex crimes, CALCRIM No. 1191, deprived him of his right to a fair trial. At trial, he objected to CALCRIM No. 1191, but was overruled.[3]

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[3] CALCRIM No. 1191 as given by the court, "The People presented evidence that the defendant committed the crimes of lewd act on a child under the age of 14 and lewd act on a child age 14 or 15 that were not charged in this case. These crimes are defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to conclude from that evidence that defendant was disposed or inclined to commit sexual offenses and based on that decision also conclude that the defendant was likely to commit and did commit a lewd act on a child under the age of 14 as charged in counts 1, 2, and 3. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all other evidence. [¶] It is not sufficient by itself to prove the defendant is guilty of the charged offenses of lewd act on child under the age of 14. The People must still prove each element of every charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose other than that which was stated except for the limited purpose of determining the defendant's intent in the charged offenses"

In limine, the prosecutor made a motion under Evidence Code section 1108: "While it can be characterized as 1108, it involves the same victims and the same perpetrator, and it's involving the continuous course of conduct over a two-year time period, both as to [D.T.] and as to [C.E.]. Just the conduct in regard to [C.E.] in that first year is outside the statute of limitations."

In its written motion, the prosecution concluded: "In this case, the evidence of these other acts shows the defendant's lewd intent toward his daughters, and shows a continuous course of conduct on behalf of the defendant. The evidence corroborates the victims and shows the jury that the defendant didn't just one day put his hand down his daughter's pants without any prior inappropriate sexual activity. It would also be difficult for the victims to testify with any specificity exactly when many of the acts occurred. However, they can tell the jury how they started and that they continued through particular time periods."

In a prosecution for sexual crimes Evidence Code section 1108 specifically allows the admission of a defendant's other sexual offenses as long as the evidence is not inadmissible under Evidence Code section 352. Penal Code section 288 is specifically enumerated as a crime to which Evidence Code section 1108 applies. (Evid. Code, § 1108, subd. (d)(1)(A).) Evidence Code section 352 gives the trial court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Cain* (1995) 10 Cal.4th 1, 33.) For purposes of analysis, "'prejudicial' is not synonymous with 'damaging,' but refers

instead to evidence that '"uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

*People v. Harris* (1998) 60 Cal.App.4th 727, offers some useful guidance in evaluating a case under Evidence Code section 1108. The court suggested the following factors were relevant to evaluating the admissibility of prior sex crimes under Evidence Code section 1108: the inflammatory nature of the evidence, the probability of confusion, the remoteness in time of the uncharged acts to the charged crime, the consumption of time, and the probative value of the evidence, especially as to the degree of similarity. (*Id.* at pp. 737-740.) Under the circumstances of this record, we cannot conclude the trial court erred in admitting evidence of uncharged sexual offenses.

California courts have rejected constitutional challenges to CALCRIM No. 1191. (*People v. Wilson* (2008) 166 Cal.App.4th 1034, 1049; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480.) In 1999, the California Supreme Court approved use of CALJIC No. 2.50.01, a similar instruction to 1191. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013.) Accordingly, we follow the Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

*Statute of Limitations*

Defendant contends the court gave conflicting instructions regarding the statute of limitations. He says his rights under the United States Constitution were violated. He argues that, while usually the precise time of an offense need not be fixed, it must be fixed when the time of the offense is material.

The third amended complaint alleges the crimes charged in counts one and two, involving acts against D.T., took place between March 24, 1995 and April 30, 1995. Count three, involving C.E., is alleged to have taken place between May 7, 1988 and May

6, 1989. The court instructed the jury with CALCRIM Nos. 207,[4] 3410,[5] special instruction No. 1[6] and CALCRIM No. 3501.[7] The jury also made a finding: "We the

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[4] CALCRIM NO. 207 as given by court, "It is alleged that the crime occurred on or about March 24, 1995 and April 30, 1995. That's for count 1 and 2. And May 7, 1998 — 1988 — And May 6, 1989, that's in count 3."

[5] CALCRIM No. 3410 as given by the court, "A defendant may not be convicted of Penal code section 288 subdivision (a) P.C. which is counts 1 and 2 unless the prosecution began within 10 years of the date of the crimes — 10 years of the date the crimes were committed. [¶] The present prosecution began on March 8, 2005. [¶] The People have the burden of proving by a preponderance of the evidence that the prosecution of this case began within the required time. This is a different standard of proof than proof beyond a reasonable doubt. [¶] To meet the burden of proof by a preponderance of the evidence, the People must prove that it is more likely than not that prosecution of this case began within the required time. If the People have not met this burden, you must find the defendant not guilty of counts 1 and 2, namely, Penal Code section 288 subdivision (a) of the Penal Code."

[6] Special instruction No. 1 as given by the court, "Now, this goes to this finding as to count 3. [¶] The defendant may not be convicted of the crime alleged in count 3 unless a criminal complaint was filed within one year of the date of a report to a California law enforcement agency by a person alleging that she while under the age of 18 years was the victim of a crime described in section 288 subdivision (a) of the Penal Code. [¶] The People have the burden of proving by a preponderance of the evidence that prosecution of this case began within the required time. This is a different standard of proof than proof beyond a reasonable doubt. [¶] To meet the burden of proof by a preponderance of the evidence, the People must prove that it is more likely than not that the prosecution of this case began within the required time. [¶] If the People have not met this burden, you must find the defendant not guilty of the crime alleged in count 3, namely, lewd act on child under 14 years. [¶] The following factual allegations must be proved by a preponderance of the evidence: [¶] One. On March 15, 2004, [C.E.] reported to the Anaheim Police Department that she was a victim of molest when she was under 18 years of age by the act of masturbation and digital penetration. [¶] Two. The complaint accusing the defendant of the crime was filed on March 8, 2005, which was less than one year after all the crimes were reported. [¶] Three. The crimes involved substantial sexual conduct. Substantial sexual conduct is — let me start over again. [¶] Substantial sexual conduct means penetration of the vagina or rectum of either the victim or the defendant by the penis or by any other foreign object, including finders, oral copulation, or masturbation of one on the other. [¶] The terms penetration, oral copulation, and masturbation are further defined elsewhere in these instructions. I'm going to get to those in a few moments. [¶] Four. The normally applicable six-year

jury in the above-entitled action FIND IT TO BE TRUE the STATUE OF LIMITATIONS allegation pursuant to Penal Code section 803(g), as to COUNT 3."

"Where alibi is not a defense, the prosecution need only prove the act was committed before the filing of the information and within the period of the statute of limitations. [Citation.] This is so because the precise time of a crime need not be declared in the accusatory pleading except where time is a material ingredient of the offense. [Citations.] (*People v. Obremski* (1989) 207 Cal.App.3d 1346, 1354.) "Although the prosecution has the burden of proving the crimes occurred within the applicable statute of limitations, the statute of limitations is not an element of the offense. [Citation] Therefore, the prosecutor need only demonstrate that the crime occurred

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statute of limitation for the crime alleged in count 3, which is lewd act with a child, pertaining to victim — alleged victim [C.E.], expired before the complaint in this case was filed. [¶] Five. There is independent evidence that clearly and convincingly corroborates [C.E.]'s allegations. [¶] I know this is a wordy instruction. This is special instruction number one. But basically, those five things I just read to you are factual allegations that must be proved by a preponderance of the evidence. [¶] Now, as to factor number five, I'm going to repeat this one. There is independent evidence that clearly and convincingly corroborates [C.E.]'s allegations. [¶] Clear and convincing evidence of the corroboration means evidence of such convincing force that it demonstrates in contrast to the opposing evidence a high probability of the truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence. [¶] If you find that the crime of lewd act on child under 14 years as alleged in count 3 occurred before January 1, 1988, you must find the defendant not guilty of count 3. [¶] You will receive a separate finding form on count 3 and must decide whether the prosecution commenced this case within the required time period."

[7] CALCRIM No. 3501 as given by the court, "The defendant is charged with lewd act on child under 14 years in count 3. Sometime during the period of May 7, 1988 through May 6, 1989. The People have presented evidence of more than one act. To prove the defendant committed this offense you must not find the defendant guilty unless: [¶] One, you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed; [¶] Or two, you all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period."

within the applicable statute of limitations by a preponderance of the evidence. [Citation.] (*People v. Smith* (2002) 98 Cal.App.4th 1182, 1187, fn. omitted.)

"Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, or 289, or Section 289.5,[ ] as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object." (Penal Code § 803, subd. (f)(1).)

Here CALCRIM No. 3501 told the jury it had to unanimously agree to one act, or unanimously agree that defendant committed all of the alleged acts to find him guilty of count three. Special instruction No. 1 told the jury any act defendant committed before January 1, 1988 would not qualify under the statute of limitation exception. Accordingly, it is not reasonably likely the jury interpreted CALCRIM No. 207 as excusing the prosecution from proving some portion of its case. When the instructions are read as a whole, it is clear the jury had to unanimously agree on one act that occurred on or after January 1, 1988, or else unanimously agree defendant committed all of the alleged acts on or after January 1, 1988.

As to counts one and two, the prosecutor likely assisted the jury in working its way through this difficult process in arguing to the jury: "Then you had [D.T.]'s testimony. [D.T.] testified . . . that she's currently age 24, her date of birth is March 10 of 1983 . . . she reported to the police on March 6 of 2004 . . . . [¶] Now, the only reason why the date she reported is relevant is because that also has to be within the 10-year time frame per the statute of limitations. . . . That the prosecution was started within 10 years of the actual offense . . . . [¶] . . . [¶] . . . She testified that the acts occurred right after her 12th birthday — shortly after her 12th birthday. Her 12th birthday would have been March 10 of . . . 1995. [¶] So that's why it's alleged from her 12th birthday essentially through April. She said it happened in March or April. The prosecution was

commenced on March 8 of 2005. So it is within 10 years. Just barely, but it's within the 10 years."

The jury had its work cut out. At times the exact same crime against the exact same victim was charged and other times uncharged. The law regarding the statute of limitation varied, depending on the victim and the crime charged. In evaluating the evidence and applying the law, the jury dealt with three different burdens of proof. The record before us, however, does not indicate the jury did anything but follow the carefully crafted and complicated instructions given to it by the court. Accordingly, we presume the jury followed them.

As to defendant's argument he was denied his right to proof beyond a reasonable doubt required by *Apprendi v. New Jersey* (2000) 530 U.S. 466, it is rejected. The statute of limitations does not increase punishment and is not an element of a charged crime, but a substantive matter for which the prosecution's burden of proof is preponderance of evidence. (*People v. Thomas* (2007) 146 Cal.App.4th 1278, 1285-1286.)

*Consecutive Sentence*

Defendant argues the trial court improperly imposed a consecutive sentence on count three by relying on aggravating factors not found by a jury to be true beyond a reasonable doubt. *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, does not apply to consecutive sentences. (*People v. Black* (2005) 35 Cal.4th 1238, 1263; *People v. Black* (2007) 41 Cal.4th 799, 821.)

## III

## DISPOSITION

We need not discuss defendant's argument regarding cumulative prejudice from errors as we have found no error. The judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.